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IN THE

Supreme Court of the United States

OCTOBER TERM 1998

DAVID M. DALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner David M. Dale respectfully submits this reply brief in response to the Brief for the United States in Opposition (hereinafter cited as "Br. Opp."), which was served in final form on November 20, 1998.[1]

ARGUMENT

1. A. On the first question presented by the Petition, the government concedes that there is an existing conflict among the Circuits, and notes that this Court recently granted review to resolve that conflict (Br. Opp.6), in *Neder v. United States,* 119 S. Ct. 334 (October 13, 1998), approximately one

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[1] Preliminary typewritten copies of the brief in opposition were served on November 18, 1998.

month after the instant Petition was filed. The government argues that the pendency of *Neder* is a reason for denying review in this case (Br. Opp.6-8). However, considerations of both fairness and sound judicial administration counsel otherwise.

As the government notes, *Neder* is a direct review case, *see United States v. Neder,* 136 F.3d 1459 (11th Cir. 1998), whereas the instant Petition arises on collateral review under 28 U.S.C. § 2255. Far from supplying a reason for denying review here, the distinct procedural postures of the two cases support granting review in both cases, so as to allow this Court to render a comprehensive opinion concerning the classification of *Gaudin* error under the various error formulations applied on direct and collateral review.

Plainly, the lower courts are in need of guidance concerning the similarities and distinctions among harmless-error analysis, "actual prejudice" under *United States v. Frady,* 452 U.S. 152 (1982), "plain error" as construed in *United States v. Olano,* 507 U.S. 725 (1993), and more recently in *Johnson v. United States,* 520 U.S. 461 (1997), and "structural error" as articulated in *Sullivan v. Louisiana,* 508 U.S. 275 (1993), particularly as applied to a *Gaudin*-type error involving the failure to submit an essential element of a crime for jury determination. As was noted in the Petition (*see* Pet.12-13), this Court's address to the subject in *Johnson* appears to have deepened rather than resolved the subsisting conflict among the Circuits.

Having now decided in *Neder* to take up the question for review, this Court also should grant review in this case, in the interest of sound judicial administration in the supervision of the lower courts. Sound exercise of this Court's certiorari

jurisdiction implies that the Court should, where possible, seek to issue a more comprehensive opinion once it has decided to engage on a particular topic, so as to avoid the need to grant certiorari on related questions in the near future. The pendency of both *Neder* and the instant Petition gives this Court with the opportunity to issue a more comprehensive and non-advisory opinion on the underlying question, which supplies an addition reason for granting review here.

B. As in the opinion below, the government's brief in opposition relies in part upon an assumed relationship between direct and collateral review standards, on the grounds of dicta from some of this Court's previous opinions (Br. Opp.6-7; *see also* Pet.15). Only by granting joint consideration of both direct and collateral review cases may this Court finally determine the authority of those dicta. On the merits, we believe that the Court should not adhere to any strict hierarchy between direct and collateral review standards, given the distinct functions of those procedures (*see* Pet.15-16). But the question can never be resolved authoritatively in the absent of the joint review of both types of cases together.

2. On the second question presented for review — the applicability of the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), to federal prisoner motions under 28 U.S.C. § 2255 — the government's brief simply misses the point, on several levels. This question is not the subject of conflict among the circuits, but it has profound consequences for the structure of our constitutional government, and therefore should be resolved by this Court, especially given its nearly-routine occurrence in the daily administration of justice.

Nearly ten years now have passed since the *Teague* doctrine was announced, but as applied to federal prisoners, it

lacks a constitutional foundation; it lacks a basis in the applicable statutory language of § 2255, as previously construed by this Court in *Davis v. United States*, 417 U.S. 333, 344-45 (1974); and it lacks a basis in sound policy as applied to federal prisoner cases (*see* Pet.18-20). The government's brief in opposition makes no response to any of these points (*see* Br. Opp.8-9), and there is no response to be made, because none of the reported decisions analyze these questions beyond the point of asserting the interest in "finality" of federal criminal judgments. We do not dispute that there is such an interest. But it is not an absolute, and it does not answer any of the issues raised by the extension of *Teague* to federal prisoners, which is a decision that has never been made by this Court, and can only be made by this Court.

Either *Teague* rests upon federal-state comity interests, as the opinion itself says, or it does not. If not, then what constitutional principle elevates "finality" above the Bill of Rights? If *Teague* is an application of § 2255, then how can it be reconciled with the language of that statute, as construed by this Court in *Davis*? And what is the purpose of applying *Teague* to federal prisoners in any case, given that § 2255 motions by federal prisoners serve a broader and different function than § 2254 petitions by state prisoners? These questions have not been answered by the lower courts, and can only be answered definitively by this Court. These questions are of exceptional importance and broad application in the administration of criminal justice in the federal courts, and should be settled by this Court.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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